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In the Supreme Court of the United States

No. 556

OCTOBER TERM, 1942

BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF CREEK, STATE OF OKLAHOMA, a Municipal Corporation, ET AL.,
Petitioners,
VERSUS
EVELYN SEBER ET AL.,
Respondents.

Certiorari Granted January 11, 1943
Opinion Delivered April 19, 1943

PETITION FOR REHEARING

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May, 1943.

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PETITION FOR REHEARING

To the Honorable Harlan Fiske Stone, Chief Justice of the United States, and Associate Justices of the Supreme Court of the United States.

Petitioners respectfully submit that they have been aggrieved by an opinion of the Court rendered herein on the 19th day of April, 1943, in the respects hereinafter set forth, and pray for a rehearing of said matter.

BRIEF IN SUPPORT OF PETITION FOR REHEARING

The opinion fails to recognize that, in the sphere of Indian affairs, the power of Congress to interfere with the operation of state law is limited to legislation on behalf of tribesmen living in "distinct [Indian] political communities having territorial boundaries," and on behalf of property within such "territorial boundaries" (Worcester v. Georgia, 6 Pet. 515, 561).

That is what the concept of "Indian Tribe" meant to John Marshall—that is what the concept of "Indian Tribe" meant to the framers of the Constitution. In other words, Article 1, Section 8 of the Constitution confers on Congress the power "to regulate commerce" with any Indian group constituting "a distinct community, occupying its own territory, with boundaries accurately described." A tribal status so defined cannot be a mere creature of legislative fiat. A tribal status of that character must result from a common mode of life, governed by tribal institutions, and contained within "boundaries accurately described." If tribal status could be arbitrarily fixed by Congress, then Congress could confer "tribal" status on any group of persons and proceed thereafter to override state law, under the commerce clause. This manifestly was not contemplated by the framers of the Constitution nor by those contemporaries of the framers who had occasion to construe the constitutional clause in question. All of this was overlooked in the opinion wherein the following statement was made at page 10:

"And although the Creek tribal rolls were closed on March 4, 1906, Congress has recognized that un-enrolled Creeks of the half blood or more are tribal Indians subject to federal control" (Citing 47 Stat. 777, 49 Stat. 1135, 49 Stat. 1967, 56 Stat. —).

If Congress attempted to legislate as to commerce which was actually "intrastate," this Court could not concern itself with the fact that Congress had declared that such commerce had "interstate" status. In the same way, this Court cannot concern itself with the fact that Congress has declared that certain individuals have "tribal" status. Just as the Court must strike down federal legislation affecting commerce which is not actually "interstate" (even though Congress has "found" that the commerce *was* "interstate"), so must the Court hold unconstitutional *this* legislation affecting commerce which is *not* actually with the Indian Tribes (even though Congress has "found" that individuals of the type in question had "tribal" status).

Why do we say that the legislation in the case at bar does not come within the constitutional authorization to regulate commerce with the Indian Tribes? Let us refer again to *Worcester* v. *Georgia*, *supra*. The legislation in question is not legislation on behalf of "a distinct community, occupying its own territory." This is legislation on behalf of scattered individuals, who do not live and have never lived as a part of any tribe, confined within "its own territory with boundaries accurately described." The individuals concerned have lived out among the white people, and constitute no organic part of an Indian Tribe in any meaningful sense.

The very land in question is not tribal "territory with boundaries accurately described." And, as the Court recognized, the individuals concerned are not even *enrolled* in any tribe.

When the courts have, in the past, sustained tax exemption of "allotted" lands, they were dealing with property originally tribal in character "with boundaries accurately described." And that is the type of congressional interference with state taxation which is authorized by the Constitution. *Rickert* v. *United States*, 188 U. S. 432 (cited at p. 8 of the opinion).

But the land involved here has no tribal associations and has always been subject to state taxation.

It is desirable, at this point, to quote at length from the opinion of Mr. Chief Justice Marshall in *Worcester* v. *Georgia*, *supra*:

> "From the commencement of our government, Congress has passed acts to regulate trade and intercourse with the Indians; which treat them as *nations*, respect their rights, and manifest a firm purpose to afford that *protection which treaties STIPULATE*. All these acts, and especially that of 1802, which is still in force, manifestly consider the several Indian *nations* as DISTINCT POLITICAL COMMUNITIES HAVING TERRITORIAL BOUNDARIES, within which their authority is *exclusive*, and having a right to *all the lands* WITHIN THOSE BOUNDARIES, which is not only acknowledged, but *guaranteed by the United States*'" (pp. 556, 557) (Emphasis supplied).
>
> "The treaties and laws of the United States contemplate the *Indian territory* as COMPLETELY SEPARATED from that of the *States*; and provide that all intercourse with them shall be carried on exclusively by

the government of the Union. Is this the rightful exercise of power, or is it usurpation?" (pp. 557, 558) (Emphasis supplied).

"... That instrument [Constitution] confers on Congress the powers of war and peace; of making treaties, and of regulating commerce with foreign nations, and among the several states, and with the Indian tribes ...

"The Indian nations had always been considered as DISTINCT, INDEPENDENT POLITICAL COMMUNITIES, retaining their original natural rights ... The very term 'nation,' so generally applied to them, means 'a people distinct from others.' The Constitution, by declaring treaties already made, as well as those to be made, to be the supreme law of the land, has adopted and sanctioned the previous treaties with the Indian *nations*, and consequently admits their rank among those powers who are capable of making treaties. The words 'treaty' and 'nation' are words of our own language, selected in our diplomatic and legislative proceedings by ourselves, having each a definite and well understood meaning. WE HAVE APPLIED THEM TO INDIANS, AS WE HAVE APPLIED THEM TO THE OTHER NATIONS OF THE EARTH. They are applied to all in the same sense" (pp. 559, 560) (Emphasis supplied).

"The Cherokee Nation, then, is a *distinct community*, occupying *its own territory*, with *boundaries accurately described*, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter but with the assent of the Cherokees themselves or in conformity with treaties and with the acts of Congress. The whole intercourse between the United States and this *nation* is, by our Constitution and laws, vested in the government of the United States" (p. 561) (Emphasis supplied).

It is clear that the Indians in the case at bar cannot be brought within that category of Indians in whose behalf the federal government has constitutional authorization to over-

ride state law. The legislation in question does not treat these Indians as a "nation." It does not treat these Indians as being a part of "distinct political communities having territorial boundaries" which are "guaranteed by the United States." The legislation in question does not "contemplate the *Indian* territory as *completely separated* from that of the *States*"—quite the contrary. This Court cannot say as to the legislative proceedings in question: "We have applied them to Indians as we have applied them to the other nations of the earth." They are applied to all in the same sense."

At page 7 of the opinion, the following assertion is made:

"The Acts of 1936 and 1937 are constitutional."

But the discussion which follows the assertion lends no support whatsoever to the assertion; it is all devoted to proving something which is not at issue, viz., that Congress has constitutional authorization to interfere with state law on behalf of such an Indian Tribe as constitutes "a distinct community, occupying its own territory, with boundaries accurately described."

The opinion admits that such power to interfere with state law is to be found only in the commerce clause of the Constitution. And *Worcester* v. *Georgia, supra*, is cited. We have already demonstrated that *Worcester* v. *Georgia, supra*, makes it clear that the commerce clause sustains the holding reached there, but that it likewise defines the limits within

which the congressional power may operate. It should be clear that respondents herein are outside those limits.

There is nothing in the Constitution, express or implied, which permits or authorizes Congress to interfere with state law (or state taxation) when individual Indians, such as those in the case at bar, go out into the market and traffic in lands which have no tribal associations.

Let us now examine that part of the opinion at page 7 which follows the assertion of constitutionality:

> "... From almost the beginning the existence of federal power to regulate and protect the Indians and their property against interference even by a state has been recognized . . . The power is not expressly granted in so many words by the Constitution, except with respect to regulating commerce with the Indian tribes, but its existence cannot be doubted . . ."

Worcester v. *Georgia, supra*, is cited by the Court to support the above statement—and there is nothing wrong with the statement as to the existence of federal power, in so far as it refers to federal power to protect, against state interference, such an Indian Tribe (or Nation) as constitutes "a distinct community occupying its own territory, with boundaries accurately described." But *there is nothing in the Constitution, express or implied, which permits or authorizes Congress to interfere with state law (or state taxation) when individual Indians, such as those in the case at bar, go out into the market and traffic in lands which have no tribal associations.*

After the above quoted reference to the Constitution at page 7, the opinion engages in a discussion of the helpless-

ness of the Indians. Such a discussion is out of place in this case, because the state is not here attempting to interfere with any lands which are under the protection of *treaty* obligations. The lands in question form no part of any "territory with boundaries accurately described" which was set aside for some Indian Tribe by the United States. If the lands in question were of the latter category, then they would, of course, be immune from state interference, including taxation.

Extending from the lower part of page 7 over to page 8 of the opinion is a quotation from *United States* v. *Kagama*, 118 U. S. 375, 384-85. That case held that—under the constitutional power "to regulate commerce . . . with the Indian Tribes"—Congress could provide a system of federal criminal law for Indians on an *Indian Reservation* even though such Reservation was within a State. Of course, Congress had power—it was legislating on behalf of a "distinct political community having territorial boundaries"—it was dealing with "Indian territory . . . completely separated from that of the States"—it was dealing with "a distinct community, occupying its own territory, with boundaries accurately described." The Kagama case joins *Worcester* v. *Davis*, *supra*, in defining the limits within which the congressional power may operate. And, as stated above, it should be clear that respondents are outside those limits.

Also on page 8 we have a discussion on the protection of tribal lands which were distributed in severalty. We are cited to *Rickert* v. *United States*, 188 U. S. 432, which held

such lands immune from state taxation. Why were they immune from state taxation? (1) They were parceled out to enrolled members of the tribe (the Indians in the case at bar are un-enrolled). (2) The lands had never been subject to state taxation, being ancestral tribal lands (the lands in the case at bar were always subject to state taxation and had no tribal associations). (3) The Indians constituted a "distinct community, occupying its own territory, with boundaries accurately described" (not so in the case at bar).

At page 9, we are cited to *Shaw* v. *Oil Corp'n*, 276 U. S. 575, 580-581, and we are told that:

> "The clear implication of the Shaw case is that those acts are valid exercises of congressional power and we so hold."

With all due respect to the Court, we urge that no amount of judicial dicta, no matter how "clear" its "implication," can be substituted for constitutional authorization. It is true that the Shaw opinion took no cognizance of the fact that the Constitution contains no more than a grant to Congress of power to regulate commerce with the Indian Tribes; *i. e.*, power to interfere with state law on behalf of such an Indian Tribe as constitutes "a distinct community, occupying its own territory, with boundaries accurately described." But the fact that the Shaw opinion took no cognizance of the constitutional limitation affords no justification for a continuance of the practice. Furthermore, the reference made to such matters in the Shaw case was merely dictum.

We are further told, at page 9 of the opinion, that:

> "They [these acts] are appropriate means by which the federal government protects its guardianship, and prevents the impairment of a considered program undertaken in discharge of the obligations of that guardianship."

But no congressional acts can be "appropriate" for any purpose when they are not within the scope of the constitutional power given to Congress. The Constitution says nothing about any "guardianship" by virtue of which the Congress may deprive a state of a taxing power over lands which have never had any tribal associations.

We do not here assert that the federal government even needs any constitutional authorization for assuming a "guardianship" over any Indians, tribal or otherwise (That is a matter between the Indians and the federal government with which the states have no concern). But a guardianship founded on expediency rather than constitutional authorization must yield the same respect to the state law of taxation as any other guardianship. If some Indians are found incompetent to manage their property, that is not so strange. Many white people are found incompetent to manage their property and guardians are appointed for them. But the guardian of an incompetent is expected to see that state taxes are paid on the property of his ward, and the existence of the guardianship does not suffice to destroy the tax lien. If the United States feels that it has an obligation to these Indians—but there is really no constitutional authorization for interference with state taxation—that does not mean that the United States has no way of protecting the Indians. Just

let the United States pay the taxes in cash, as any other guardian would, and as the United States did do in section 1 of the 1936 Act.

Here is an observation to be made: Indian persons who live in "distinct [Indian] political communities having territorial boundaries" impose no burden on the State for road construction and maintenance, police protection, and other public services. Indians living in that fashion—who imposed no burden on the States—were the type of Indians who have been involved in the previous decisions interfering with state taxation. But the lands involved in the case at bar are scattered through the white man's community and must, of necessity, receive the benefit of road construction and maintenance, police protection, and other public services. If the federal government feels obliged to protect its "wards" when they go outside their "distinct political communities having territorial boundaries" and procure these services at the expense of the State, let the federal government pay for such services by footing the tax bill.

CONCLUSION

For more than one hundred and fifty years, there have been congressional enactments and judicial decisions affecting Indian property—all on the authority of the commerce clause of the Constitution. Many of the enactments and decisions interfered with the operation of state law—many of them interfered with state taxation. But all of them had this in common: They dealt with property within "boundaries

accurately described." They "contemplated the Indian property as completely separated from that of the States." They dealt with the Indians as being a part of "distinct political communities having territorial boundaries."

In all of this legal business affecting Indians, no attempt was ever made to interfere with state law as it affected persons or property, *except* on behalf of Indian persons who were actually bonafide tribesmen living in "distinct [Indian] political communities having territorial boundaries," and on behalf of property within such "territorial boundaries."

Now, *for the very first time* (in these Acts of 1936 and 1937), an attempt is made to interfere with state taxation on behalf of Indian persons who are *not* bonafide tribesmen and who are *not* living in "distinct [Indian] political communities having territorial boundaries" and whose property is *not* within such "territorial boundaries."

It is this fact which makes it absolutely necessary to go back to the commerce clause of the Constitution. For all previous congressional enactments and judicial decisions, the commerce clause has been broad enough to sustain the interference with the state law. Why? Because, as above stated, there was never any question as to the tribal character of the persons and the property.

All of this means, of course, that previous judicial decisions afford no guide to the question involved here. Never before has this Court had occasion to consider the limits of the commerce clause from this standpoint.

If—as to certain commerce which was actually intrastate—Congress should pass legislation which resulted in interference with state taxation of such commerce, we could appeal to this Court to hold such legislation unconstitutional and free the state taxing power of such restraint. And such legislation would be held unconstitutional even though Congress had found that the commerce in question was interstate, and even though the legislation had been passed in pursuance of a beneficent purpose.

Now Congress has passed certain legislation under the commerce clause which results in interference with state taxation. The legislation is not, strictly speaking, a regulation of commerce with an Indian Tribe. However, a liberal interpretation has often obtained, *i. e.*, legislation has been sustained merely on the ground that it was enacted on behalf of Indian persons who lived in "distinct [Indian] political communities having territorial boundaries" and whose property was within such "territorial boundaries." But the 1936 and 1937 Acts do not even come within this liberal view, let alone the constitutional language: "to regulate commerce . . . with the Indian Tribes." So the fact that the persons seeking tax exemption here purport to be tribal members on the basis of congressional fiat, is really immaterial. In no event could it be said that such persons live in "distinct [Indian] political communities having territorial boundaries" or that their property was within such "territorial boundaries." Therefore, this legislation should be declared unconstitutional, even though Congress may have said, or implied, that such

legislation regulates commerce with the Indian Tribes, and even though the legislation was passed in pursuance of a beneficent purpose.

We realize that a petition for rehearing is often accorded scant attention. But we have earnestly endeavored to avoid, in this brief, a mere repetition of previous briefs filed in the case. We hope and believe that our analysis of the opinion of April 19 will be of service to the Court. We pray a rehearing in this matter.

Respectfully submitted,

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May, 1943.

SUPREME COURT OF THE UNITED STATES.

No. 556.—October Term, 1942.

Board of County Commissioners of the County of Creek, State of Oklahoma, a municipal corporation, et al., petitioners,
vs.
Evelyn Seber, et al.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Tenth Circuit.

[April 19, 1943.]

Mr. Justice Murphy delivered the opinion of the Court.

This petition for certiorari presents the questions whether certain lands held by respondent Indians, subject to restrictions against alienation and encumbrance without the approval of the Secretary of the Interior, were exempt from Oklahoma real estate taxes for the year 1937 by virtue of the Act of June 20, 1936, 49 Stat. 1542,[1] whether a portion of those lands were exempt for subsequent years by virtue of the Act of 1936 as amended by the Act of May 10, 1937, 50 Stat. 188,[2] and whether the Acts of 1936 and 1937, so applied, are constitutional.

The facts are agreed. Prior to 1931 the Secretary of the Interior purchased three tracts of land, two rural and one urban, in Creek County, Oklahoma, for Wosey John Deere, an enrolled, full-blood member of the Creek Tribe of Indians. The purchase price was paid out of restricted royalties from an oil and gas lease of her restricted allotted land. She was given title subject

[1] Section 2 of this Act provides:
"All lands the title to which is now held by an Indian subject to restrictions against alienation or encumbrance except with the consent or approval of the Secretary of the Interior, heretofore purchased out of trust or restricted funds of said Indian, are hereby declared to be instrumentalities of the Federal Government and shall be nontaxable until otherwise directed by Congress."

[2] The 1937 Act amended § 2 of the 1936 Act to read as follows:
"All homesteads, heretofore purchased out of the trust or restricted funds of individual Indians, are hereby declared to be instrumentalities of the Federal Government and shall be nontaxable until otherwise directed by Congress: *Provided*, That the title to such homesteads shall be held subject to restrictions against alienation or encumbrance except with the approval of the Secretary of the Interior: *And provided further*, That the Indian owner or owners shall select, with the approval of the Secretary of the Interior, either the agricultural and grazing lands, not exceeding a total of one hundred and sixty acres, or the village, town or city property, not exceeding in cost $5,000, to be designated as a homestead."

to a condition against alienation or encumbrance without approval of the Secretary prior to April 26, 1931.[3] Before that date, with the approval of the Secretary, she reserved a life estate and conveyed the fee to her children, full-blood but un-enrolled Creeks and respondents here, subject to a like condition against alienation or encumbrance without the approval of the Secretary with the exception that the restriction had no definite time limitation. On December 10, 1937, Wosey John Deere conveyed her life estate to respondents so that they became full owners subject to a restriction against alienation or encumbrance without the approval of the Secretary. Both conveyances were in consideration of love and affection. Thereafter, on December 16, 1937, respondents designated the two rural tracts, totalling eighty-seven and one-half acres, as a tax exempt homestead under the provisions of the Act of May 19, 1937, and the Secretary approved this designation on March 24, 1938.

Before the Act of June 20, 1936, the lands were subject to Oklahoma real estate taxes.[4] Thereafter all three tracts were continued on the tax rolls of Creek County, and respondents, to avoid the accumulation of penalties and interest and a sale of the lands for taxes, paid the taxes for the years 1936, 1937, 1938, and part of 1939. On July 26, 1940, they filed this action in federal district court for the recovery of the 1936 and 1937 taxes paid on all three tracts, for the recovery of the 1938 and 1939 taxes paid on the two rural tracts designated as homestead lands, and for a declaration that the homestead lands were tax exempt. The district court gave judgment as prayed. 38 F. Supp. 731. The Circuit Court of Appeals affirmed for the most part but reversed with respect to the 1936 taxes on the ground that liability for them became fixed on the assessment date, January 1, 1936, before the enactment of the Act of June 20, 1936.

[3] In Sunderland v. United States, 266 U. S. 226, it was held that the Secretary of the Interior had power to impose such a restriction against alienation or encumbrance with respect to lands purchased for Indians of the Five Civilized Tribes (of which the Creeks are one) with the proceeds from sales of their restricted allotted lands. We think it clear that he also has authority to impose such restrictions upon lands purchased with restricted funds from leases of restricted allotted lands (see Shaw v. Oil Corp'n., 276 U. S. 575, and United States v. Brown, 8 F. 2d 564 at 568), and to make those restrictions run with the lands in the hands of Indian grantees. Cf. Drummond v. United States, 34 F. 2d 755, 758-59; United States v. Goldfeder, 112 F. 2d 615.

[4] See Shaw v. Oil Corp'n., 276 U. S. 575.

Interest on the taxes paid was also disallowed. 130 F. 2d 663. The importance of the case in the administration of Indian affairs and its impact upon state finances caused us to grant the County's petition for certiorari. Respondents have not cross-petitioned for review of the adverse decision on the 1936 taxes and the allowance of interest so it is unnecessary to consider those questions.

We hold that the 1936 Act extended tax immunity to all three tracts for the year 1937, that thereafter the 1937 Act exempted the designated homestead lands, and that both Acts, so applied, are constitutional.

Section 2 of the 1936 Act conditions tax immunity upon two requirements: (1) "title" to the lands must be "held by an Indian subject to restrictions against alienation or encumbrance except with the consent or approval of the Secretary of the Interior"; and, (2) the lands must have been "heretofore purchased out of trust or restricted funds of said Indian". Both requirements are met here with respect to all three tracts. These lands were purchased from the restricted royalties received from an oil and gas lease of the restricted allotted lands of Wosey John Deere, and, on the assessment day, January 1, 1937,[5], she held title to a freehold life estate in all the parcels, subject to restrictions against alienation and encumbrance which were validly imposed by the Secretary of the Interior.[6]

Petitioners advance two arguments against the applicability of the 1936 Act. First they contend from remarks made by the sponsor of the 1936 Act in the Senate[7] that the Act applied only

[5] Under Oklahoma law the taxable status of property in Oklahoma is fixed as of the assessment date, January 1, in each year although taxes are levied as of July 1. See Board of Commissioners v. Central Baptist Church, 136 Okla. 99; In re Sinclair Prairie Oil Co., 175 Okla 289; In re Champlin Refining Co., 186 Okla. 625. For the purposes of this case we assume without deciding that the status of the property on the assessment date is determinative.

[6] See Note 3, *ante*.

[7] Senator Thomas said in part: "Formerly the Congress authorized the Secretary of the Interior to buy land for landless Indians. The Secretary proceeded to buy the lands and assigned the Indians to reside upon such lands. The recommendation or assertion was made to the Indians that the land would be theirs and they would have no taxes to pay. . . . In some cases tax warrants have been issued and the Indians have been threatened with dispossession. The Department believes that, in order to keep faith with the Indians, the tax warrants and tax assessments should be paid and the title to the lands cleared. The bill authorizes the appropriation of money for that purpose.

Section 2 provides that the lands so secured shall hereafter be nontaxable." 80 Cong. Rec. 9159.

to lands purchased for landless Indians, and thus did not extend to lands purchased from the restricted funds of Wosey John Deere, who held allotted land. We do not read those remarks as limiting the scope of the 1936 Act to landless Indians; they do not deal in terms of exclusiveness. But if they are to be interpreted as petitioners contend, we do not accept them as definitive because they are opposed to the clear words of the Act, the reasons for its enactment,[8] its contemporary administrative interpretation,[9] and its subsequent Congressional history.[10] Secondly petitioners assert that the exemption of the 1936 Act was personal and extended only to lands the title to which was held by the Indian whose restricted funds were used to purchase the lands. This position finds some support in the language of the Act, referring to "lands the title to which is held by an Indian . . . , purchased out of trust or restricted funds of said Indian", but it is unnecessary to determine whether the purpose of Congress was such that the Act should be more broadly construed than its technical terms might indicate. For, even assuming *arguendo* that petitioners are correct in saying that the 1936 Act afforded only a personal exemption, Wosey John Deere whose restricted funds purchased the three tracts, held a restricted life estate in each tract on January 1, 1937, the assessment date. As the life

[8] The Meriam Report to the Secretary of the Interior on the Problem of Indian Administration (Brookings Institute, 1928), pp. 795-98, pointed out that allotments were often unsuitable for homes, that other lands had to be purchased, and that while restricted allotted lands and the trust proceeds thereof had been held immune from state taxation, the tax status of property purchased with trust funds from sale or lease of allotted lands was in doubt. Legislation conferring tax exemption was recommended to protect the Indians against inability to pay or their insufficient sense of public responsibility, and to keep faith since officials of the federal government had expressly or impliedly represented that lands so purchased were tax exempt. The House and Senate reports show that this was the problem at which the 1936 Act was aimed. H. Rep. 2398, S. Rep. 2168, 74th Cong., 2d Sess. See also Cohen, Handbook of Federal Indian Law (1942), pp. 260-61.

[9] The Acting Attorney General and the Solicitor of the Department of the Interior both ruled that the 1936 Act applied to lands purchased from the restricted funds of individual Osage Indians who were not landless. 38 Op. A. G. 577; 56 I. D. 48.

[10] In reporting a bill to repeal the broad provision of § 2 of the 1936 Act the House Committee on Indian Affairs said: "It will be observed from the language of section 2, . . . that it applies to *all* lands purchased by restricted Indian funds and the Attorney General so held." H. Rep. 562, 75th Cong., 1st Sess. (emphasis supplied). The Senate substituted for the repealer an amendment limiting § 2 to homestead lands, which became the 1937 Act, but the Senate committee report also makes it clear that the 1936 Act covered all restricted Indian lands purchased out of restricted funds. S. Rep. 332, 75th Cong., 1st Sess.

tenant she was obligated to pay the taxes under Oklahoma law. 60 Okla. Stat. Ann. § 69; *Helm* v. *Belvin*, 107 Okla. 214; *Riley* v. *Collier*, 111 Okla. 130; *Waldon* v. *Baker*, 184 Okla. 492, 495. Since the 1936 Act was concerned with a tax exemption, the proper test of whether an Indian purchaser had "title" within the meaning of the Act must be whether he had retained such a property interest that, but for the Act, he would be subjected to the tax. Here Wosey John Deere retained such a title, and the three tracts were clearly within the 1936 Act even accepting petitioners' construction.

Likewise, the two rural parcels comply with the description contained in the 1937 Act which provides in part: "All homesteads, heretofore purchased out of the trust or restricted funds of individual Indians . . . shall be non-taxable until otherwise directed by Congress: *Provided*, That the title to such homesteads shall be held subject to restrictions . . ." Those parcels were purchased from the restricted funds of an individual Indian, Wosey John Deere, respondents hold them subject to valid restrictions,[11] and they were properly designated by respondents as homestead lands on December 16, 1937, prior to the 1938 assessment date.[12] In view of the legislative history of the 1937 Act, summarized in note 10 *supra*, petitioners' argument that the 1937 Act applies only to lands purchased for landless Indians must be rejected.

It has been suggested that the tax exemption granted by the 1937 Act is personal to the Indian whose restricted funds were used to purchase the land, or else that it extends to the land in the hands of restricted Creek Indian grantees only until 1956, consonantly with the statutes governing the tax status of restricted allotted lands of the Creeks.[13] The Act does not say, however, and there is not a word to suggest that upon transfer of the lands to Indian heirs or grantees, subject to restrictions, the exemption is either to terminate or else extend only until 1956. If Congress had intended either result, it could easily have expressed those

[11] See Note 3, *ante*.

[12] The Secretary did not approve the designation until March 24, 1938, but we think this approval related back to the date of designation.

[13] See Act of June 30, 1902, 32 Stat. 500, 503; Act of April 26, 1906, § 19, 34 Stat. 137, 144; Act of May 27, 1908, §§ 4, 9, 35 Stat. 312, 313, 315; Act of April 10, 1926, 44 Stat. 239; Act of May 10, 1928, 45 Stat. 495; Act of May 24, 1928, 45 Stat. 733; Act of March 2, 1931, 45 Stat. 1471; Act of June 20, 1932, 47 Stat. 474; Act of January 27, 1933, 47 Stat. 777.

purposes. It did neither but provided instead that the lands while restricted were to remain non-taxable until it directed otherwise. In the absence of explicit Congressional direction we do not think we should hold the exemption personal or attempt to derive an applicable principle from the complicated and admittedly ambiguous statutes governing the tax status of restricted allotted Creek lands. Respondents received the land, which they have designated as a homestead, subject to restrictions of indefinite duration which the Secretary of the Interior had authority to impose.[14] It seems only fair, as the clear words of the 1937 Act provide, that the tax exemption should follow the restrictions and continue so long as they do, unless Congress meanwhile provides to the contrary. Even if the 1937 Act were ambiguous, we think this interpretation should be taken. Cf. *United States v. Reily*, 290 U. S. 33, 39.

It is argued, however, that the 1936 Act created only a personal exemption, and the 1937 Act gave no more because it was an amendment to the 1936 Act intended solely to limit the unnecessarily broad exemption of that Act. It is true that this was the avowed purpose of the 1937 Act,[15] but it does not follow that the 1937 Act grants but a personal exemption or else allows the exemption only until 1956. While the question need not be decided, it is appropriate to notice that the purpose of the 1936 Act makes it at least doubtful whether that Act afforded only a personal exemption. Assuming, however, that it did, there is nothing to indicate that the 1937 Act, contrary to its terms, incorporated the same limitation. The applicable committee report sheds no light one way or another.[16] There is no inconsistency between the object of the 1937 Act to limit the sweeping exemption of all lands granted by the 1936 Act, to homestead lands, and a purpose to enlarge the exemption accorded to the relatively small amount of homestead lands so that it would apply to restricted homesteads passing to Indian heirs or grantees. The fact that extensive changes in language were made in the 1937 Act is persuasive, moreover, that a change in sense from the presumed personal exemption of the 1936 Act was intended. If the only object of the 1937 Act was to limit the application of the 1936

[14] See Note 3, *ante*.

[15] See H. Rep. 562, S. Rep. 332, 75th Cong., 1st Sess.

[16] S. Rep. 332, 75th Cong., 1st Sess.

Act (with its assumed personal exemption) to homesteads, that purpose could have been accomplished simply by substituting the word "homesteads" for the word "lands". We cannot accept the view that the substantial changes in language were only matters of style. Furthermore, it has not been suggested that respondents, as takers from the original purchaser, were incompetent to designate the lands as a homestead under the 1937 Act. If they could do that, as we and apparently the Secretary of the Interior think they could,[17] it would seem to follow that, having properly designated their homestead under the Act, they are entitled to the tax exemption afforded restricted homesteads by the Act until Congress otherwise directs.

The Acts of 1936 and 1937 are constitutional. From almost the beginning the existence of federal power to regulate and protect the Indians and their property against interference even by a state has been recognized. Cf. *Worcester* v. *Georgia*, 6 Pet. 515. This power is not expressly granted in so many words by the Constitution, except with respect to regulating commerce with the Indian tribes, but its existence cannot be doubted. In the exercise of the war and treaty powers, the United States overcame the Indians and took possession of their lands, sometimes by force, leaving them an uneducated, helpless and dependent people needing protection against the selfishness of others and their own improvidence. Of necessity the United States assumed the duty of furnishing that protection and with it the authority to do all that was required to perform that obligation and to prepare the Indians to take their place as independent, qualified members of the modern body politic. This was classically summarized in *United States* v. *Kagama*, 118 U. S. 375, 384-85:

"From their (the Indians') very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the Executive and by Congress, and by this court, whenever the question has arisen.

. . . . . .

The power of the General Government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection, . . . It must exist in that government, because it never has existed anywhere else, because the

[17] The Secretary approved respondents' designation. See Note 12, *ante*.

theater of its exercise is within the geographical limits of the United States, because it has never been denied, and because it alone can enforce its laws on all the tribes."

After 1871 Congress turned from regulating Indian affairs by treaties to regulation by agreement and legislation. The plenary character of this legislative power over various phases of Indian affairs has been recognized on many occasions.[18] One aspect of this legislative program commenced with the General Allotment Act of 1887, 24 Stat. 388, followed by various other allotment acts dealing with specific tribes,[19] whereby Congress embarked upon a policy of assimilating the Indians through dissolution of tribal governments and the compulsory individualization of Indian land.[20] To lessen the difficulty of the period of transition and to protect the allottees' interest in their lands, Congress, by the device of the trust patent or a restricted fee, denied them the power to alienate or encumber their lands for fixed periods of time, subject to extension—denials which were sustained as proper exercises of Congressional power. *Tiger* v. *Western Investment Co.*, 221 U. S. 286, 310-17; *Brader* v. *James*, 246 U. S. 88, 96; *Sunderland* v. *United States*, 266 U. S. 226, 233-34. The obligation and the power of the United States to protect and preserve those restricted allotted lands for the Indian owners has been recognized. *Heckman* v. *United States*, 224 U. S. 413, and they were held immune from state taxation as instrumentalities by which the United States provided for the welfare and education of its Indian wards. *Rickert* v. *United States*, 188 U. S. 432.[21] It has also been

[18] See United States v. Kagama, *supra*; Choctaw Nation v. United States, 119 U. S. 1, 27; Stephens v. Cherokee Nation, 174 U. S. 445, 486; Lone Wolf v. Hitchcock, 187 U. S. 553, 566-68; Tiger v. Western Investment Co., 221 U. S. 286, 310-17; United States v. Sandoval, 231 U. S. 28, 45-47; Brader v. James, 246 U. S. 88, 96; Sunderland v. United States, 266 U. S. 226, 233-34; United States v. Ramsey, 271 U. S. 467, 469, 471; United States v. McGowan, 302 U. S. 535, 538-39; Board of Comm'rs v. United States, 308 U. S. 343, 349.

[19] Wosey John Deere received her allotment under an agreement negotiated with the Creeks by the Dawes Commission and incorporated into the Act of March 1, 1901, 31 Stat. 861, as amended by the supplemental agreement of June 30, 1902, 32 Stat. 500. See also § 19 of the Act of April 26, 1906, 34 Stat. 137, 144; Act of May 27, 1908, 35 Stat. 312; and Act of May 10, 1928, 45 Stat. 495.

[20] Allotments in severalty were halted by the Wheeler-Howard Act of June 18, 1934, 48 Stat. 984, and by the Oklahoma Welfare Act of June 26, 1936, 49 Stat. 1967. These and other recent statutes reflect a change in policy, the theory of which is that Indians can better meet the problems of modern life through corporate, group, or tribal action, rather than as assimilated individuals.

[21] The land involved in the Rickert case was a trust allotment, rather than a restricted fee. The power of Congress over both types of allotments, however, is the same. See United States v. Ramsey, 271 U. S. 467, 471.

held by the lower federal courts that proceeds from the sale or lease of restricted allotted lands are immune from state taxation. See *United States* v. *Thurston County*, 143 Fed. 287; *National Bank of Commerce* v. *Anderson*, 147 Fed. 87. When this Court came to consider the tax status of lands of the character here involved, that is, lands purchased for an Indian from the trust or restricted proceeds of his restricted allotted land, it said that, "In a broad sense all lands which the Indians are permitted to purchase out of the taxable lands of the state in this process of their emancipation and assumption of the responsibility of citizenship, whether restricted or not, may be said to be instrumentalities in that process." Lands so purchased, however, were held to fall within that class of "instrumentalities which, though Congress may protect them from state taxation, will nevertheless be subject to that taxation unless Congress speaks." *Shaw* v. *Oil Corp'n.*, 276 U. S. 575, 580-81.

As a result of the *Shaw* decision Congress spoke in the Act of 1936 and the amendment of 1937, which were intended to protect the Indians in their land purchases from restricted funds and to keep faith with them because of the implied or express representations that those lands were tax exempt.[22] The clear implication of the *Shaw* case is that those Acts are valid exercises of Congressional power and we so hold. They are appropriate means by which the federal government protects its guardianship and prevents the impairment of a considered program undertaken in discharge of the obligations of that guardianship. The fact that the Acts withdraw lands from the tax rolls and may possibly embarrass the finances of a state or one of its subdivisions is for the consideration of Congress, not the courts. Cf. *Fed. Land Bank* v. *Bismarck Co.*, 314 U. S. 95, 104. Also, it is immaterial that respondents are citizens because it is settled that the grant of citizenship to the Indians is not inconsistent with their status as wards whose property is subject to the plenary control of the federal government. See *Tiger* v. *Western Investment Co.*, 221 U. S. 286, 312-17; *Brader* v. *James*, 246 U. S. 88, 96. It rests with Congress to determine when the guardianship relation shall cease. *Tiger's* case, *supra*; *United States* v. *Ramsey*, 271 U. S. 467, 469; *United States* v. *McGowan*, 302 U. S. 535, 538. Thus

22 See H. Rep. 2398, S. Rep. 2168, 74th Cong., 2d Sess. See also the Meriam Report to the Secretary of the Interior on the Problem of Indian Administration (Brookings Institute, 1928), pp. 795-98.

far Congress has not terminated that relation with respect to the Creek Nation and its members. That Nation still exists,[23] and has recently been authorized to resume some of its former powers. Act of June 26, 1936, 49 Stat. 1967. And although the Creek tribal rolls were closed on March 4, 1906,[24] Congress has recognized that un-enrolled Creeks of the half blood or more are tribal Indians subject to federal control.[25] Respondents fall in this class.

We have considered the other contentions raised by petitioners and find them without merit. The judgment below is correct in the matters appealed from and is therefore

Affirmed.

Mr. Justice REED took no part in the consideration or decision of this case.

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[23] The Act of March 1, 1901, 31 Stat. 861, and the supplemental agreement of June 30, 1902, 32 Stat. 500, provided for the dissolution of the Creek Tribe on March 4, 1906, but this provision was revoked by the joint resolution of March 2, 1906, 34 Stat. 822, and § 28 of the Act of April 26, 1906, 34 Stat. 137, 148.

[24] Section 2 of the Act of April 26, 1906, 34 Stat. 137.

[25] See Act of January 27, 1933, 47 Stat. 777; Act of Feb. 11, 1936, 49 Stat. 1135; Act of June 26, 1936, 49 Stat. 1967; Act of December 24, 1942, c. 813, 56 Stat. —.

SUPREME COURT OF THE UNITED STATES.

No. 556.—October Term, 1942.

Board of County Commissioners of the County of Creek, State of Oklahoma, a municipal corporation, et al., petitioners, *vs.* Evelyn Seber, et al.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Tenth Circuit.

[April 19, 1943.]

Mr. Justice Rutledge.

I concur in the result and also in the opinion except as it relates to the taxes for 1938 and thereafter, levied and collected under the 1937 Act. I agree that the exemption extended for these years to Wosey John Deere's grantees, but for different reasons and with the limitation, which I think should be stated, that under presently effective legislation the exemption extends only to 1956.

As I understand the ruling, the opinion grounds the exemption for grantees squarely on the 1937 Act, without reference to whether they were also exempt under the 1936 Act, a question not decided. With that I cannot agree. The later statute amended the earlier one. Both its terms and its legislative history[1] show it had only one purpose. That was to cut down the amount of land exempted. "All homesteads" took the place of "all lands." There were other changes in language, but they were matters of style, not of substance. There is not a word in the Act of 1937 itself or in the Committee reports to Congress to show that any other change was in mind. I find therefore no evidence of purpose to enlarge the protected class at the same time the amount of land exempted was being reduced. Nor is mere absence of language expressly limiting the exemption to a class defined in the Act a sufficient basis for implying an intent to enlarge the protected class. Nullifying the power of a state to tax land within its borders held by or for private individuals is too important and delicate a matter to hang on such an implication.

[1] See H. R. Rep. No. 562, 75th Cong., 1st Sess.; S. Rep. No. 332, 75th Cong., 1st Sess.

In my opinion therefore the sole purpose and effect of the 1937 Act was to reduce the quantity of land for which exemption could be claimed. Consequently, if grantees were within the benefit, it was because they were so by virtue of the 1936 Act.

A literal reading of that Act possibly would lead to the conclusion that grantees were excluded and the protection was personal to the Indian with whose funds the lands were purchased. But the language is not absolutely conclusive to this effect, and in my opinion the legislative history[2] shows that the purpose again was not to enlarge or restrict the classes to which the benefit applied, but rather was to bring within the scope of preexisting exemptions lands not covered by them. Any other view would create as to the lands covered by the 1936 Act, which were acquired with restricted funds, a different and a preferred exemption as compared with that applicable to originally allotted lands, from the sale of which in large part the funds were derived. No intent can be imputed to Congress to give the substituted lands preferential treatment as compared with original allotments. The language does not require this and nothing in the legislative history gives a basis for believing it was intended. There is no sufficient reason in either for thinking that Congress intended to create new classes of beneficiaries or new kinds of exemptions, whether in duration or otherwise. There was a preexisting and defined general policy in both respects, no problem of either sort was presented by the situation the Act was intended to cure, and the sole purpose, in my opinion, was to make sure the preexisting exemptions would extend to the lands specified in the Act. Accordingly, whether grantees were exempted and, if so, for how long is to be determined not by implication or construction from the terms of the 1936 Act alone, but by reference to the law as it existed in respect of grantees of original allottees prior to 1936.

There is no need to go back of 1928, except to say that, for our purposes, the effect of prior legislation was that grantees of original allottees were not within the existing tax exemptions,[3] which

[2] See H. R. Rep. No. 2398, 74th Cong., 2d Sess.; S. Rep. No. 2168, 74th Cong., 2d Sess. See also 80 Cong. Rec. 9159 and Meriam Report to the Secretary of the Interior on the Problem of Indian Administration (Brookings Institute, 1928) 795-8.

[3] *Cf.* Act of June 30, 1902, c. 1323, § 16, 32 Stat. 500, 503; Act of April 26, 1906, c. 1876, § 19, 34 Stat. 137, 144; Act of May 27, 1908, c. 199, §§ 4, 9, 35 Stat. 312, 313, 315; Act of April 10, 1926, § 115, 44 Stat. 239.

were for the most part to expire at the latest in 1931.[4] In some instances, restrictions extended to lands held by heirs of allottees, but for the limited period.[5] In 1928, Congress extended existing restrictions on some lands—both alloted and inherited—to 1956, but at the same time removed existing restrictions on others. 45 Stat. 495. The existing tax exemption was cut down in scope to one hundred sixty acres of each Indian's holding, but was also extended more clearly to cover the land in the hands of "any full blood Indian heir or devisee," though not beyond 1956. 45 Stat. 495, as amended by 45 Stat. 733-4.

In 1933, probably by reason of the discovery of oil on Indian lands, consequent sale or lease of original allotments under the direction of the Secretary of the Interior, and numerous suits by Indians claiming the proceeds free from his restrictive power, Congress enacted another statute, 47 Stat. 777, which made all Indian funds then in or later coming to the Secretary's hands restricted. It contained the following proviso, which is the last word, for our purposes, on exemption of Five Civilized Tribe Indian lands prior to 1936:

Provided, That where the entire interest in any tract of restricted and tax-exempt land belonging to members of the Five Civilized Tribes is acquired by inheritance, devise, gift, or purchase, with restricted funds, by or for restricted Indians, such land shall remain restricted and tax-exempt during the life of and as long as held by such restricted Indians, but not longer than April 26, 1956. . . . Provided further, That such restricted and tax-exempt land held by anyone, acquired as herein provided, shall not exceed one hundred and sixty acres.

In a number of respects the meaning of the provision is unclear. But, without attempt to clarify them, the general purpose seems to have been to exempt lands belonging to members of the Five Civilized Tribes during their lives, but not beyond 1956 and not exceeding 160 acres, if "acquired by inheritance, devise, gift, or purchase, with restricted funds, by or for such restricted Indians." The proviso is awkwardly drawn, and some of the language could be taken to limit the exemption to the Indian with whose restricted funds the lands are acquired. But other language contradicts this and the legislative history shows it was contemplated the exemption would extend to heirs, devisees, donees

[4] 34 Stat. 144; 35 Stat. 315; 44 Stat. 239.

[5] See 35 Stat. 315; 44 Stat. 239.

and purchasers with restricted funds.[6] In short, as to the lands covered, Indian heirs, devisees, donees and grantees were within the protection. That the proviso covers directly the lands in question in the hands of Wosey John Deere's grantees may be doubted.[7] But, whether or not the statute applies specifically to this case, it shows the latest phase of Congressional policy, prior to 1936, as to the kind of exemption given to members of the Creek Nation and the persons entitled to its benefit.

In this background the 1936 Act was adopted. In my opinion it incorporated the previously existing exemption, as it related to duration and grantees, but extended it to "all lands" rather than merely the homestead. The 1937 Act returned to the homestead limit, but without change in other respects. In my view, therefore, and for these reasons, the grantees of Wosey John Deere were entitled to the benefit of the exemption, but unless it is extended further by Congress, only to 1956.

Mr. Justice ROBERTS joins in this opinion.

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[6] See H. R. Rep. No. 1015, 72d Cong., 1st Sess.; S. Rep. No. 873, 77d Cong., 1st Sess.; see also 75 Cong. Rec. 8163, 8170.

[7] They are homestead lands. They were bought with her restricted funds. She, if anyone, was a "restricted Indian," though that term is new in this Act and unclear. She acquired the lands by purchase. Her children took them by deed, whether by gift or by "purchase" is not material. They, too, were "restricted Indians," if she was. At any rate, they were full blood. All these things would fit the statute to the present case. On the other hand, the tax exemption in the proviso apparently extends only to newly acquired lands which prior to their acquisition were tax exempt and restricted. See 75 Cong. Rec. 8170. Nothing in the record indicates that the lands here involved were either tax exempt or restricted when Wosey John Deere purchased them. However, the precise significance of the apparent requirement that the lands shall have been tax exempt before they were acquired is obscured by the context of the proviso in a statute addressed primarily to the problem of restricting funds (in the hands of the Secretary) obtained largely from the sale of interests in restricted lands.